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ABSTRACT

A study of the legal and regulatory barriers to the expansion of family day care in New York State was made. Research for the study consisted of a two-part survey of members of the New York State Child Care Coordinating Council and the New York City Family Day Care Task Force; interviews with public officials, child care advocates, and child care experts; and an intensive review of state laws and regulations pertaining to family day care. The following legal barriers were identified and are the focus of this report: a fragmented licensing system, multiple agency regulation, attempted regulation by municipalities through exclusionary zoning, and widespread provider noncompliance and lack of enforcement of the licensing law. The problem of obtaining liability insurance for family day care providers was also identified as a major practical barrier to the expansion of licensed family day care. Chapter I describes the regulatory problems identified in the survey. Chapter II analyzes the legal and regulatory framework that created and perpetuates the problems. Chapter III analyzes the problem of municipal zoning and family day care. The final chapter offers specific recommendations for change. (RH)

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CASTING A BLIND EYE
REGULATION OF FAMILY DAY CARE
IN NEW YORK STATE

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PS 016381

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April 1986

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AUTHOR'S NOTE

This report was commissioned by Child Care Inc., a New York City not for profit organization that has been a catalyst for the expansion of family day care services. On behalf of Child Care Inc., I wish to acknowledge the invaluable assistance of the members of the New York State Child Care Coordinating Council and the New York City Family Day Care Task Force. They not only participated in the survey, but also gave generously of their time and assistance.

The report was supported by a grant from IBM through the Work/Family Directions Project, a child care consulting organization that coordinates a national network of Child Care Resource and Referral agencies. As a member of this network, Child Care Inc. is especially grateful for the continued confidence and support of Work/Family Directions.

The author would like to thank all members of the staff of Child Care, Inc. who made this study possible. I would also like to thank those who have provided quality child care to my very young children, enabling me the opportunity and peace of mind to write this report. And to my husband, special thanks for his infinite patience.

This report needs to be read with the understanding that the law is always changing. Of course, the author is solely responsible for the opinions expressed in this report and for any errors.

April 7, 1986

Karen Norlander

INTRODUCTION

> "It wasn't easy to face the fact that I had to go back to work and leave my infant with a stranger. I wanted to find a good family home in my neighborhood which would offer my child an opportunity to play and learn with a small group of children in a home that offered a family like environment."
>
> Interview with parent of a six month old child

With almost fifty percent of all mothers with children under the age of three in the work force,[1] child care decisions are affecting families at most socioeconomic levels. Although they may not know it by name, or know that it is regulated and licensed in New York State, many parents may be looking for family day care.[2]

According to the New York State Council on Children and Families, there are more than 364,000 preschool age children in need of child care in New York State.[3] Yet the combined capacity of all licensed child care programs - centers as well as family day care homes, provides a total of only 132,195 day care "slots."[4]

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[1] Families and Child Care: Improving the Options, Select Committee on Children, Youth and Families, U.S. House of Representatives, P.12, 1984. According to the Bureau of Labor Statistics, almost half of all mothers with infants under one year are now in the work force.

[2] According to a federal study, "parents have traditionally shown a distinct preference for family day care over centers or other group facilities for infants and toddlers, [and] it is expected that the family day care market will absorb most of the increased demand for the care of children under three." Hawkins, Patricia Divine, Family Day Care In the United States, Final Report of the National Day Care Home Study, Executive Summary, P.3, U.S.Department of Health and Human Services, DHHS Pub. No. (OHDS) 80-30287.

[3] New York State Council on Children and Families, Trends, Vol.2, No.1, Jan. 1985.

[4] Task force on Women's Issues, Summary of Legislation, March 1985.

Although family day care is the most widely used form of day care for children in the United States and it is estimated that approximately half of the children in day care are in family day care homes,[5] there are only 3,625 licensed family day care homes in New York State. Of the total, 90% of the licensed homes in the state are certified for children eligible for public subsidy.[6] Yet, only 16% of all the children in need of subsidized child care are currently receiving it.[7] For the majority of parents, including those who are ineligible for subsidized care, there are 104 certified homes in New York City and only 287 licensed family day care homes in the rest of the State.[8] (See Table 1 for Distribution of Subsidized and Non-Subsidized Family Day Care in New York State.)

The lack of child care in general is serious and the shortage of both subsidized and non-subsidized family day care is acute. Long waiting lists of children eligible for subsidized child care are typical. And for the majority of working parents, licensed family day care is not even an available option.

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5 According to a federal study " parents have traditionally shown a distinct preference for family day care over centers or other group facilities for infants and toddlers, [and] it is expected that the family day care market will absorb most of the increased demand for the care of children under three." Hawkins, Patricia Divine, Family Day Care In the United States, Final Report of the National Day Care Home Study, Executive Summary, P.3, U.S. Department of Health and Human Services, DHHS Pub. No. (OHDS)80-30287.

6 More than half of these licensed homes are reserved exclusively for children entitled to publicly subsidized day care in New York City. There are only enough certified family day care homes and licensed day care centers to serve 20% of the total number of children in New York City eligible for subsidized care.

7 SYA and the New York State Child Care Coordinating Council, "Where Have All the Children Gone, A Study of Day Care Cuts in New York State," 1984.

8 New York State Department of Social Services, Recap of Permits Issued and Certificates Approved, report ending 11/31/85. See Table 1.

According to State Social Services statistics, the number of licensed family day care homes available today represents a 19 percent decrease since 1980. As the availability of licensed child care decreases, the number of working mothers with children under the age of six has doubled since 1970, and a 38 percent increase in the number of preschoolers with working mothers is projected by 1990.9 Given current social trends and the limited availability of licensed family day care, it is clear that the gap between supply and demand will continue to widen unless something is done to address a growing crisis.

Most states regulate the provision of family day care, and New York is no exception. Under New York State law, any person who cares for more than two unrelated children must obtain a permit or certificate. Although family day care accounts for 80 to 90% of all infant day care, it is estimated that only 10 to 30% of the homes are licensed.10 A system that casts a blind eye on unlicensed providers presents serious obstacles to all who are seeking to make quality family day care available.

Particularly for women and children living in poverty, employment opportunities must be coupled with adequate child care options. Without legal day care options, any efforts to bring low income mothers with young children into the work force will be seriously undermined.

New York's unenforced regulatory system also presents major obstacles to corporate initiatives to provide their employees with Child Care Resource and

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9 Select Committee on Children, Youth and Families, Demographic and Social Trends: Implications for Federal Support of Dependent Care Services for Children and the Elderly, Dec. 1983.

10 Weinstein, Lori, 1983-84 Family Day Care Licensing Study, The Children's Foundation (1985).

Referral services. (CCRRs) For corporations, "the year 1985 saw the toddler care cause graduate from do-goodism to hard dollar calculations."11 To address the shortage of affordable, quality child care arrangements, more than three hundred corporations are funding Child Care Resource and Referral agencies to provide a variety of child care related services to their employees.12 By providing assistance to parents in their search for child care, the CCRRs can maximize parental choice in making child care arrangements. Offering a variety of support services and technical assistance to both parents and providers, CCRRs have a direct impact on the quality of child care. As child care advocates, CCRRs also seek to expand the availability of affordable quality child care. Without licensed family day care, however, the ability of the CCRRs to make child care referrals is severely curtailed, because CCRRs properly do not refer children to providers operating outside the law.

Illegal providers not only are deprived of the valuable referral services of the CCRRs, but they are ineligible for U.S. Department of Agriculture food subsidies, and they are frequently unable to obtain liability insurance. Parents who send their children to unlicensed family day care homes will find that there is no agency to turn to for help when problems arise unless the situation involves child abuse or neglect.

With the vast majority of family day care homes in New York State underground and unregulated, parents and the agencies assisting them are

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11 Pierce, Neal, "Corporate Day Care Sets a Positive Role Model," Editorial, Gannett Westchester Newspapers, Jan. 7, 1986, p.8.

12 "More Corporations are Offering Child Care," New York Times, June 21, 1985, p. 18; "Child Care Finds a Champion in the Corporation," New York Times, August 4, 1985, p. 1.

increasingly frustrated with the widespread disregard for regulation, and with the government's lack of enforcement and monitoring. Indeed, there is a consensus emerging that the regulatory system itself may be the major obstacle to the expansion of family day care in New York State. As the Director of Work/Family Directions testified at a recent State Senate Child Care Hearing:

> "We can report to you that New York stands alone, and unique, as the state with the most insurmountable barriers to the development of family day care." 13

The lack of licensed family day care in New York State is extreme and atypical. For example, in California there are 32,000 licensed homes for a population of 23 million, while New York has only 3600 licensed homes for a population of 17 million. Massachusetts, a state with a population of only four million people, has more than 9,000 licensed homes. (See Table 2 for Comparison of Total Number of Family Day Care Homes in Selected States.)

Why is New York so far behind other states and what can be done to correct the current situation? Child Care Inc., a child care resource and referral agency in New York City, sought answers to these questions in the Spring of 1985. With the cooperation of the New York State Child Care Coordinating Council and the New York City Family Day Care Task Force, it undertook a study of the legal and regulatory barriers to the expansion of family day care in New York State.

The purpose of the study was threefold: first, to identify and analyze the legal and regulatory framework for family day care in New York State; second, to examine the problems resulting from the regulatory framework; and

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13 Morgan, Gwen, Executive Director, Work/Family Directions. Testimony delivered at the New York State Senate Child Care Hearing, Oct. 1985. Work/Family Directions manages a network of child care resource and referral services in 250 cities throughout the United States.

finally, to suggest strategies to overcome the barriers to the availability of quality family day care for all children in New York State. Research for the study consisted of a two part survey of members of the New York State Child Care Coordinating Council and the New York City Family Day Care Task Force; interviews with public officials, child care advocates and child care experts, and an intensive review of New York State laws and regulations pertaining to family day care.

This report presents the results of that study. The following legal barriers were identified and are the focus of this report:

(1) A fragmented licensing system;
(2) Multiple agency regulation;
(3) Attempted regulation by municipalities through exclusionary zoning and
(4) Widespread provider noncompliance and lack of enforcement of the licensing law.

The problem of obtaining liability insurance for family day care providers was also identified as a major practical barrier to the expansion of licensed family day care.

This report paints a picture of a fragmented and overlapping legal and regulatory system that discourages provider participation and impedes the expansion of licensed care. The result is a large number of underground providers operating openly as state and local authorities continue to cast a blind eye. On the one hand, licensing requirements are routinely unenforced or ignored, giving tacit approval to those providers who continue to operate underground. On the other hand, providers seeking to operate legally, face barriers imposed by local authorities.

The purpose of regulating any service is to protect the consumer by ensuring that minimum standards are met. Family day care is no exception. But the existing system in New York State fails to achieve this goal. It lacks

consistent standards and imposes others that may be cumbersome and frequently irrelevant to consumer safety. Worse, the system itself is so complex that it undermines efforts to make licensed family day care available and accessible to all the children who need it.

This report is divided into four chapters. The first chapter describes the regulatory problems identified in the survey. The second chapter analyzes the legal and regulatory framework that created and perpetuates the problems. The third chapter analyzes the problem of municipal zoning and family day care. The final chapter is devoted to specific recommendations for change.

PART I: IDENTIFYING THE PROBLEMS

A. Problem Identification: The Survey

To identify legal problems that affect expansion of family day care in New York State, each agency in the New York State Child Care Coordinating Council and in the New York City Family Day Care Task Force was sent two questionnaires. The first questionnaire was open-ended, designed to elicit from respondents what they perceived as legal or regulatory barriers to the expansion of family day care.

The second questionnaire listed the issues identified in the first survey, and sought more detailed information about the nature and extent of the problems. The response levels for both survey instruments were quite good.[14]

Interviews were then conducted with government officials, day care specialists, professionals, and providers, in an attempt to gain a broad perspective of the problems. The author also attended meetings of day care advocates that provided further clarification of the issues. The surveys and fact-gathering helped immeasurably to focus the legal research.

The following legal problems were identified by survey respondents:

1) The Problem of the Dual System: Subsidized and Non-Subsidized Care

The laws and regulations governing family day care create a two-tier system, one for children whose care is state subsidized, and another for children who are not eligible for subsidized care. As stated by one survey

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[14] There were 17 responses to 38 questionnaires in the first round, and there were 19 responses to the second questionnaire. Responses of substantially less than twenty-five per cent are not uncommon in mailed surveys. D. Miller, Handbook of Research Design and Social Measurements (1977).

respondent:

> "The family day care licensing system at the state level has been unable to meet the demand for individuals who want to become licensed, and [the State has] given local Social Services Departments authority to do so. In our area, the local DSS will only certify homes that they need ... for their clients. They will not make the list of licensed providers available to the Child Care Resource and Referral agency or to [the] public. This leaves a gap for parents looking for licensed family day care."
>
> "Access to county certified family day care providers is not available to the public. The policy is to keep it in-house even though there may be vacancies."15

As a result, there is no single agency responsible for licensing all family day care homes in New York State. Instead, the State Department of Social Services issues "permits" to providers of non-subsidized care, while "certificates" are granted by authorized child caring agencies. An authorized child care agency includes "a social services district or a voluntary child caring agency... approved by the New York State Board of Social Welfare and granted legal authority to provide care in family day care homes."16 To complicate matters further, all non-subsidized child care in New York City is exempt from state regulation. Accordingly, the City Department of Health has promulgated its own set of regulations and grants "certificates of approval" to providers of non-subsidized family day care in the City. Thus, the agency responsible for licensing a family day care home will depend on where the home is located and whether the home provides care for children eligible for subsidized or

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15 Child Care Inc. Survey respondent, June 1985.

16 18 NYCRR 417.1(c).

non-subsidized care.17

A national expert on family day care regulation made these observations about the New York regulatory system:

> "New York's system is unique. The state has what I would call a 'two window' regulatory system. If you want to care for children who are subsidized by the state...you go to the certification window....If you want to care for the children of working parents, who are not subsidized by the state and are not considered a social service need, you go to the licensing window. However, there is nobody at the licensing window to grant you your license. Nevertheless you are breaking the law if you care for children without a license.
> Nor has the state even begun to meet the demand for subsidized care for low income children who are eligible. Providers who want to take care of low income children who have not been fortunate enough to win their way into the state's severely restricted subsidized-certification window, must also line up at the

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17 Throughout this report, a distinction is made between "subsidized" and "non-subsidized" care. Non-subsidized care encompasses all independent (or private) child care arrangements. The vast majority of families pay for child care out of their own pockets, and are not entitled to public or private assistance, although they may receive tax credits for part of their expenses.

The cost of family day care may be publicly subsidized for some low income families. Each local social services district has an option to earmark Title XX (The Social Services Block Grant) funds to day care for low income families and to set eligibility standards. Subsidized care is also available for children entitled to day care as a "preventive service" under the Child Welfare Reform Act or as a "protective service" under Title XX of the Social Security Act. Authorized agencies must license and contract with providers of Title XX funded care. In order to qualify for these funds, the provider must meet applicable state and local standards. There are no federal programmatic standards for Title XX eligibility.

Child care is also an allowable work expense (an earning disregard) under the Aid to Families with Dependent Children (AFDC) program. AFDC recipients purchase child care directly and are then entitled to spend up to a maximum of $160 per month per child for full-time care. 42 USC 602.(a)(8)(A)(iii). There is no requirement that the care be licensed. Thus, many working mothers receiving AFDC are among those who use private unsubsidized child care.

empty licensing window." 18

This dual agency licensing structure creates confusion, frustrating prospective providers who seek licensing information, parents seeking child care, and child care councils attempting to coordinate local efforts to provide quality day care.

The majority of providers offering private care must obtain a permit from the State Department of Social Services. If they live in New York City, they may be required to obtain a Certificate of Approval from the City Health Department. In either case, neither the City nor the State have made the necessary commitment of staff to perform the licensing function. As of December, 1985 the New York State Department of Social Services had only seventeen employees assigned to licensing family day care homes for the entire state. These licensing specialists are also responsible for licensing and inspecting more than 900 day care centers. Currently, there is only one person assigned by the New York City Health Department to license all non-subsidized family day care homes for the entire city.

The providers of subsidized care must obtain a certificate from local authorized agencies before they may accept children. In some counties, local social services departments only certify day care providers for agency clients. Others give a low priority to certification of homes that are not exclusively reserved for their clients.

Providers of subsidized care receive a stipend of only $30 to $45 per week per child from the placement agency while non-subsidized providers

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18 Gwen Morgan, Testimony at State Senate Child Care Hearing, October 1985.

receive between $50 and $110 per week per child from private families.[19] Given the obvious fiscal incentive, it is hardly surprising to find that authorized agencies are not always willing to share the names of their certified family day care providers with the Child Care Resource and Referral agencies (CCRRs) or parents.

Despite the statutory framework that created the dual system, a few child care councils have broken down the barriers between subsidized and non-subsidized care. For example, in Westchester County the local Child Care Council contracts with the local social services department to recruit and inspect all family day care homes, regardless of whether the child is placed through the Department of Social Services or privately.[20] Similar cooperative models are being developed in other counties to overcome the obstacles created by legislation which designates separate licensing agencies. In other counties, the barriers to licensed care remain so great that the CCRRs concentrate their recruitment and referral efforts on providers who care for only two children. Because state law only requires providers who care for more than two children to obtain a certificate or permit, these CCRR "registered" homes fall outside the regulatory system.

2. <u>The Problem of Provider Noncompliance</u>

Except for certified homes providing care for publicly subsidized children, there is widespread provider non-compliance with the law. Survey respondents underscored this with the following comments:

> "In our county, family day care is abundant and yet <u>not one</u> licensed home exists."

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19 Child Care Inc. Survey, 1985.

20 Westchester County has 102 licensed family day care homes. For a comparison with other counties, see Table 1.

"We have lots of babysitters who care for 15 to 20 children alone. The underground family day care movement is growing. Reference checks are inconsistent, supervision is sporadic."

"There is very little motivation for providers to seek licensing. They can operate freely without licensing or certification and most do."

"I've never known the state to come in and close down any home, even if they serve many more children than the law allows in space that is inadequate and unsafe."[21]

The New York State Department of Social Services child care survey of November, 1985 shows that there are 3521 licensed family day care homes in New York State. Of the total, 1880 homes are exclusively maintained for subsidized care in New York City. There are currently 287 homes licensed by the State Department of Social Services.[22] In New York City, there are 104 family day care homes available to all the city's children who are not publicly subsidized. The remaining 1350 licensed family day care homes in the state have obtained certificates from local authorized public and private agencies to provide subsidized care primarily for children placed by those agencies.[23]

Compared to subsidized care, the situation with respect to private non-subsidized family day care remains one of massive non-compliance. Although the number of certified homes available for children entitled to subsidized care does not begin to meet the demand, approximately 90% of all

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21 Survey Respondents, Child Care Inc. Questionnaire, June, 1985.

22 Of the 287, more than one half of the homes licensed by State DSS are found in one county. Some county DSSs have begun to license all family day care homes without making a distinction between subsidized and non-subsidized care. However, this practice only affects a small portion of the state.

23 See Table 1 for Chart of Family Day Care Homes Licensed in New York State and numbers of children placed through the licensing agency or privately.

licensed homes in New York State have been certified by local social service districts and other authorized agencies for children under their care.[24] The majority of these homes are not available to families seeking licensed family day care. Thus, for the vast majority of parents, the options are extremely limited by a system that separates "subsidized" from "non-subsidized" family day care homes, that dismally fails to meet the demand for subsidized child care and that fails to license non-subsidized providers altogether.

These statistics suggest that the majority of family day care in New York State is provided outside the law, by "underground," unlicensed family day care providers. If demographic and social trends continue as they are expected to do, the number of working parents with young children will continue to climb while the availability of licensed family day care homes in New York State declines.[25]

3. Attempted Regulation by Non-Licensing Agencies

It is ironic that at the same time state and local, public and private agencies have been unable to get more than a small fraction of providers into compliance with the law, other agencies of government that have no authority to license family day care homes nonetheless actively attempt to regulate them. These agencies include local zoning boards and officials, building departments, fire, and health departments in cities, towns and villages. Some local agencies attempt to regulate the very existence of family day care homes in a community, others impose local standards regarding zoning, health, safety,

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[24] With only three thousand licensed homes in the State, authorized agencies find it extremely difficult to maintain a sufficient number of licensed homes for their clients.

[25] There has been a 19% decrease in licensed family day care homes in New York State since 1980.

number of children, size of house and property, and create additional procedural requirements, such as public hearings or fees as prerequisites for taking care of children in one's home.

In one county, the local Department of Health promulgated its own set of standards for family day care, requiring an inspection of the premises. Then, as a prerequisite to the health inspection, the Health Department required zoning approval. As a result, family day care providers in that county must satisfy local zoning and health standards, even though they meet all of the licensing requirements set by the state.

In other localities, fire and sanitation standards intended for day care centers or nursery schools are applied to family day care homes. Some local codes define day care centers broadly, and do not define family day care homes at all, resulting in the application of inappropriate standards. This places unobtainable prerequisites on the majority of prospective family day care providers.

Survey respondents cited such local attempts at regulation by non-licensing agencies as a major legal and practical barrier to the expansion of family day care. As described by one professional who trains both licensed and unlicensed family day care providers, many unlicensed providers decide to remain underground rather than subject themselves to local regulation, the possibility of local prosecution, the expense of defending themselves, and the possibility of jeopardizing their means of livelihood.

4. Municipal Zoning: A Barrier to the Expansion of Family Day Care

Survey responses from Child Care Resource and Referral agency staff reveal that municipal zoning is a major regulatory barrier to the expansion of family day care in the State of New York. As stated by one survey

respondent:

> "Zoning prohibits family day care in our city. When a person applies for a zoning variance, they say 'go home and babysit.' Without the variance, we have no licensed family day care in our city."
>
> "Zoning ordinances in one community have resulted in a total lack of family day care providers who are licensed. As a result, there are very few inquiries which get beyond the initial phone call." 26

Although there is no clear basis in law for the regulation of family day care under municipal zoning, some municipalities enforce zoning laws that purport to exclude family day care in residential neighborhoods; others require persons to seek a variance before a local zoning board as a prerequisite to providing family day care in their homes. Or the zoning requirements are so unrealistic that they effectively exclude the majority of prospective providers.27 And even licensed family day care providers sometimes face criminal prosecution for alleged zoning law violations.

A simple query to a municipal building department about local standards may trigger the enforcement of local zoning ordinances such as those described above. Or, a disgruntled neighbor's complaint to the municipal building department may precipitate the prosecution of a family day care provider. These are potent deterrents to compliance with the licensing law; they keep providers underground and frustrate the recruitment efforts of the child care and referral agencies. Moreover, the mere prospect of local prosecution and harassment may reinforce the typical provider's decision to remain unlicensed,

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26 Survey Respondent, Child Care Inc. Questionnaire, June, 1985.

27 For example, in one instance, a local zoning board sought to require a 25,000 square foot minimum lot size, public hearings, and zoning board approval as a prerequisite to providing family day care in a single family home in a residential neighborhood.

in violation of the state law.

To avoid the problems that result from the application of inappropriate standards to family day care, many licensing agencies do not notify municipal agencies at all. In some cases, the State Department of Social Services issues permits to homes that meet state requirements, without regard to municipal requirements.[28] As will be seen in the discussion of the issue of state preemption, this practical approach is quite defensible, for there is a strong argument that local zoning requirements that treat family day care homes in any way other than a single family home are void and unenforceable.

Given the regulatory maze faced by prospective family day care providers, it should be no surprise to find that so few licensed providers exist. The statutory scheme responsible for this morass is discussed in Part II.

5. The Problem of Legislative Indecision; The Pilot Projects

The State Legislature has studied the issue of family day care for several years. It has not, however, taken decisive steps. Rather, it authorizes pilot projects for study and evaluation while retaining the existing statutory scheme. None of the pilot projects adequately addresses the serious flaws in the existing system. Indeed, some of the pilot projects, such as the one for "group family day care," will confront more of the same regulatory barriers that family day care has encountered. Until basic regulatory issues are addressed, efforts to expand licensed family day care in New York State will continue to be thwarted.

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28 In general, a State agency is powerless to establish an eligibility condition that is not in the statute. Jones v. Berman, 37 N.Y.2d 42 (1975). Because the statute does not require compliance with any municipal codes, the State Department of Social Services lacks the power to add the requirement.

PART II

THE STATUTORY AND REGULATORY FRAMEWORK FOR FAMILY DAY CARE IN NEW YORK STATE

Family day care regulation in New York State is characteristically a piecemeal response to changing needs. The result is a patchwork of laws that fails to produce a coherent regulatory framework that is conducive to the expansion of licensed family day care. (See Chart 1 Family Day Care Licensing System in New York State.)

A. The 1942 Statutory Licensing Requirement and Definitions of the State Department of Social Services

Day care was unregulated in New York State until 1942 when legislation was enacted to facilitate the entry of women into the work force during World War II. The basic statutory authority for the regulation of family day care in New York State is found in Section 390 of the New York Social Services Law. This law originally delegated sole authority to license and establish standards for all day care to the New York State Department of Social Services. It broadly requires that

> "no place, person, association, corporation, institution or agency shall provide day care for three or more children without a permit therefor issued by the Department [of Social Services] or otherwise than in accordance with the terms of said permit and with the regulations of the department for the protection and care, including the health, safety, treatment and training of children."29

The statute does not define family day care. Instead, "Day Care of Children" is defined in regulations of the State Department of Social Services as:

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29 SSL 390.1(a).

"care provided for three or more children away from their own homes for less than 24 hours per day in a family home which is operated for such purpose, for compensation or otherwise, for more than five hours per week."30

and defines "day care in a family home" as:

"day care of not more than six children provided in an indi vidual's own home."31

Thus, family day care as defined by regulation encompasses the care of three to six children in a family day care provider's own home.32

B. The 1964 Amendments: Certificates from Local "Authorized Agencies"

In response to federal legislation which provided funding for day care as a mandated child welfare service, the statute was amended almost a quarter of a century after the initial day care legislation was enacted. The 1964 amendments (1) authorized certain public and private agencies to issue "certificates" to subsidized family day care homes; (2) excluded all non-subsidized day care in New York City from state regulation, and (3) excluded from regulation homes where certain relatives provide care.33 With the passage of these

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30 18 NYCRR 417.1(a).

31 18 NYCRR 417.1 (b). A day care center is defined by regulation as "a place, person, association, corporation, institution, or agency which provides day care ... Day care of children shall mean care provided for three or more children away from their own homes in a day care center, excluding those children receiving family day care as defined in Regulation 417.1.... 18 NYCRR 418.1(a)(b)(1). All day care centers are licensed by the State Department of Social Services pursuant to department regulations at 18 NYCRR 418.

32 Normally permitted to care for up to six children, a provider may care for only five children if any of them are under the age of three. No more than two children under the age of two can be cared for at the same time. 18 NYCRR 417.6 (c)and(d).

33 The amendments excluded from any regulation family day care provided by parents or relatives within the second degree. The probable rationale was that close family members would have sufficiently strong incentives to provide quality care for the children, and that there is no reason in such cases for state intrusion in family matters.

amendments, the system for regulating family day care in New York State became fragmented.

Under the 1964 amendments, local departments of social services in each county and in the City of New York were given responsibility for issuing certificates to **subsidized** family day care homes that care for children placed by certifying agencies. (Emphasis added.) Similarly, certain private child care agencies were authorized to issue certificates to family day care homes providing care to publicly subsidized children under their supervision.[34] The statute conditioned a certified provider's right to provide day care to a child not placed through the authorized agency upon the receipt of "written consent and approval of the certifying agency as to each child."[35] Thus, family day care homes certified by local authorized agencies were targeted primarily for children entitled to preventive and protective services and children from low income families where day care subsidies were made available as part of a county social service plan, and the agencies were given the authority to maintain these homes exclusively for children under their supervision.

The 1964 amendments also excluded from state regulation all family day care in New York City that is not publicly funded. While the local department of social services (the Agency for Child Development) continues to regulate publicly subsidized family day care in New York City according to state standards, the City's Department of Health became the agency responsible for non-subsidized family day care homes under an entirely separate regulatory

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[34] An authorized agency is defined by regulation as a social service district or a voluntary child caring agency which has been approved by the State Board of Social Welfare and granted legal authority to provide care in family day care homes.
18 NYCRR 417.1(c).

[35] SSL 390.9

scheme.[36]

To sum up, the 1964 amendments created two distinct regulatory mechanisms: one licenses family day care homes exclusively for subsidized care; the other licenses homes for non-subsidized care. Thus, four different licensing agencies with two sets of regulations emerged as a result of the 1964 amendments. Local social service districts and certain authorized private agencies became responsible for issuing "certificates" to family day care homes providing subsidized care for children placed by their agencies, while the State Department of Social Services remained responsible for issuing "permits" to all the remaining family day care homes in the State, except in New York City, where "certificates of approval" are issued by the Department of Health pursuant to regulations in the New York City Health Code. (The New York City system is covered in a separate section of this report.)

C. State DSS Regulatory Standards Governing Family Day Care

State legislation designated the State Department of Social Services as the agency responsible for the promulgation of regulations to provide for the "protection and care, including the health, safety, treatment and training of children."[37] Its standards for family day care are found in Part 417 of Book 18 of the Official Compilation of New York State Codes, Rules and Regulations. (hereinafter referred to as NYCRR).[38] (See Chart 2: Standards for Licensed Care.)

1. Procedures for Obtaining a Permit or Certificate

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36 SSL 390(a)(b) excludes from state regulation "a city wholly including one or more counties [New York City], except day care provided therein under certificates...."

37 SSL 390.1(a).

38 18 NYCRR 417.

Whether a prospective provider applies to the State Department of Social Services for a permit or to a local social service department or authorized agency for a certificate, the regulatory standards are identical. However, only authorized agencies are required to provide specific services to children and family day care homes under their supervision.39

2. The Requirement of Annual Inspections

An authorized agency is required under the statute to inspect the prospective family day care home to determine compliance with standards prior to granting a "certificate."40 In contrast, the statute does not require a home visit by State Department of Social Service officials as a prerequisite to granting a "permit" to a non-subsidized home. This became a requirement, however, under a regulation of the New York State Department of Social Services that requires an investigation of all prospective family day care homes, including visits and inspections prior to granting a certificate or permit.41 Additionally, in all cases, annual home inspections are required prior to renewal.42

3. Other State Standards Governing Family Day Care

The State Department of Social Services established a comprehensive regulatory scheme, including specific standards that apply to the physical plant, as well as provisions governing health and safety, sanitation, diet,

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39 18 NYCRR 417.13.

40 SSL 390.3.

41 18 NYCRR 417.8.

42 18 NYCRR 417.17.

adult-child ratios, and the supervision of children in family day care.[43]

4. State Reference to Local Codes: Health, Building, and Other

While Social Service regulations require

> "all rooms, outdoor play space, equipment, supplies and furnishings [to be] kept clean and sanitary at all times, " and "premises [to be] kept free from dampness, odors, vermin and accumulation of trash,"[44]

they also require family day care homes to

> "comply with the requirements of State and local departments of health. Adequate and safe water supply and sewage facilities shall be provided and shall comply with State and local laws."[45]

In addition, the regulations require a

> "statement from an appropriate official or authority that the dwelling meets standards for sanitation and safety where local fire, health and/or building code authorities require approval." [46]

These vague references in the Social Service regulations needlessly opened the door to municipal regulation of family day care. The failure to clarify either by statute or regulation that the provision of family day care in a home does not change its occupancy classification resulted in broad variations from one community to the next of municipal standards applied to family day care homes by local fire, health and building departments.

Significantly, the State Division of Housing finds no reason to treat a home differently just because three to six children receive care during the day. In a recent interpretation by the Commissioner of the Division of

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[43] 18 NYCRR 417.13.

[44] 18 NYCRR 417.7(a).

[45] 18 NYCRR 417.7(b).

[46] 18 NYCRR 417.3(d). In one instance, the local health department will not inspect until zoning approval is obtained. Thus, under the rubric of health and safety, municipal zoning approval was bootstrapped into the requirements.

Housing and Community Renewal of the New York State Uniform Fire Prevention and Building Code, it was held that:

> "the occupancy classification of a Group A 1 - single family dwelling is not changed where family day care is provided in accordance with the requirements of the N.Y.S. Department of Social Services regulation." 47

While this interpretation is binding only on the municipality requesting it, it should be highly persuasive in other municipalities.48 In the meantime, the regulatory provision that invites local regulation needlessly encourages duplication of efforts, the application of inappropriate standards, and in some cases, insurmountable local barriers to licensed family day care.

Without statutory or at least regulatory language clarifying that the use of a single family residence as a family day care home is a residential use of property for the purposes of local ordinances, the problems and confusion caused by multiple agency regulation will persist.

D. The 1983 Amendments: The Group Family Day Care Pilot Project

Nearly twenty years passed again before the state faced a new and increased demand for child care created by economic realities that drove thousands of women with young children into the work force. One response was legislation enacted to establish a "group family day care" pilot project.

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47 State of New York, Division of Housing and Community Renewal, Commissioner's Interpretation No. C1-161, In response to a request by the Building Inspector of the City of Poughkeepsie, July 3, 1985.

48 Where confusion persists, CCRRs might seek clarification from the Commissioner of the New York State Division of Housing and Community Renewal, by requesting a written interpretation whether the occupancy classification of a single family dwelling is changed under the New York State Uniform Fire Prevention and Building Code, where family day care is provided in accordance with state social services regulations. A Commissioner's interpretation can be obtained by written request to the New York State Housing and Building Codes Bureau, 2 World Trade Center, New York N.Y. 10047.

The legislation originally authorized the State Department of Social Services to permit 20 day care providers to operate "group family day care homes" for eighteen months.[49] A 1985 amendment extended the pilot project until January 1987 and also authorized the Department to license an additional 20 providers.[50]

"Group family day care" is defined by statute as care provided in a home by two family day care providers for:

> "(1) up to ten children of all ages, including not more than two children under two years of age, or (2) up to twelve children where all of such children are over two years of age and in either case with not more than two additional school-aged children receiving care before and after school time hours."[51]

Regulations have not been promulgated for the group family day care project. Department guidelines have been distributed which are quite similar to the regulations for family day care, except that they require smoke or heat detectors and designate the type of fire extinguisher and their locations. A provision identical to the one discussed earlier for family day care again opens the door needlessly to local municipal regulation, and provides that "where local fire, health and building departments require their approval, the provider shall obtain such approvals." [52]

The project is intended to provide an opportunity for the Legislature to obtain a comprehensive report from the State Department of Social Services "on the feasibility of permanently including such homes within the definition of

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49 SSL 410.4(b).

50 Chapter 874 of the New York Session Laws of 1985.

51 SSL 410.4(b).

52 Guidelines: Group Family Day Care Demonstration Homes, Physical Plant (14), p. 2.

day care... and on the success or failure of this pilot project."[53]

A final report has been submitted to the Legislature which recommends that group family day care be included as a permanent child care option.[54] R

E. 1985 Legislation: The Governor's Program Bill - 1985 Amendments for Model Projects for the Expansion of Family Day Care

Recognizing the need to expand family day care, a Governor's bill allocated $600,000 to encourage the development of a variety of model pilot projects to be monitored and evaluated until 1989. All of these projects, in one way or another, expand the role of private agencies and reduce the role of government in family day care regulation. The legislation designates the State Department of Social Services as the agency to select projects for funding. The original Governor's program bill sought to give Child Care Resource and Referral agencies (CCRRs) the authority and responsibility for licensing family day care homes while prohibiting funds to be used to expand the referral, recruitment, training and monitoring functions. Originally referred to as the CCRR bill, this label was quite misleading because funding would have been available only to those agencies accepting the licensing role, a role that the CCRRs unanimously rejected. The final version of the legislation represents a compromise between these two positions.

Chapter 804 of the laws of 1985 amends Social Services Law {390 and adds section 390-a to expand the "availability of quality day care services" by authorizing the State Department of Social Services to:

> "contract with a not for profit corporation or group of not for profit corporations, a social services district or a group of social

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53 SSL 410.4(a).

54 New York State Department of Social Services, Final Report on The Group Family Day Care Demonstration Project, Nov. 6, 1985.

services districts to operate programs which will expand the availability of quality day care services on a demonstration basis. The program must provide information, education, training and technical assistance in addition to one of the following new methods."

These demonstration models are discussed below:

1. The Registration Model

This model would give a contract agency the authority to "register" currently unlicensed family day care homes which lack a certificate or permit to operate. Prospective agencies will have to demonstrate their "ability to assess the quality of care, including the health, safety and welfare of children in registered family day care homes." Programs would be required to offer training for registered providers and to conduct annual visits to the homes.[55]

The legislation does not specify which standards apply to registered homes, although the State Department of Social Services plans to clarify that registered homes must comply with the same regulations governing all licensed family day care homes. Registration is intended to replace the need to obtain a certificate or permit.[56]

2. The Assessment Model

Under this model, a selected agency would be responsible for the investigation, including a home visit and inspection of family day care homes, on behalf of authorized agencies or the State Department of Social Services. The authorized agency or Department would issue the certificate or permit

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55 SSL 390-a-3-(a).

56 SSL 390(a)3(b). It is important to note that "registration" as defined here is quite different from the registration - self certification models adopted in several other states. (See Chapter V, Section D, Regulatory Alternatives, for further discussion.)

based on the agency's "assessment" and other available documentation.57

3. The Certification Model

The third model gives selected agencies the authority to certify family day care providers. This grants to selected agencies, the identical powers traditionally placed with the Department of Social Services and authorized agencies to issue certificates or permits to family day care providers.

This model may enable local social services districts that in practice certify only subsidized child care to expand their role to license providers of non-subsidized family day care. At the other extreme, this provision would enable private agencies to assume public functions by empowering them to certify prospective family day care providers.

Clearly, any private nonprofit agency funded to implement the registration, assessment or certification models under this pilot legislation will assume a major role in the licensing process. The implications of such a shift in responsibility from the public to the private sector need to be closely examined by any private organization seeking this funding.

4. Other Provisions in the 1985 Amendments

Three provisions in the Governor's bill address some of the problems noted previously. In order to make family day care homes available to all children, the legislation provides that "day care providers who are issued certificates or permits.... shall be authorized to care for children who are not referred to the provider by an authorized agency."58 However,

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57 This model has already been implemented in one county. Although quite successful, even with ten staff members assigned to family day care assessment, they have had to limit the number of licensed family day care homes in order to maintain a manageable caseload.

58 Chapter 804 of the Laws of 1985, SSL 390-a-5(e).

without the repeal of section 390(11) of the Social Services Law, the provision that requires providers to obtain written approval from the agency granting the certificate before the provider may offer care to a child placed through another source, this new provision's impact remains limited to the model projects.

One of the criteria for funding of the model projects will be whether "the applicant has established or will establish cooperative relationships with the social services districts in the area to be served, and whether the applicant is willing to facilitate the provision of family day care services to low-income families..."[59] It is questionable how quickly such cooperation can be fostered when the existing framework, designating different agencies for licensing of subsidized and non-subsidized family day care, remains. Moreover, unless reimbursements for subsidized care are competitive with private paying care, economic reality will make it difficult to integrate the systems.

To address the problem of local zoning, selected pilot programs are required to provide:

> "technical assistance concerning local zoning requirements which may be encountered to obtaining permits or certificates; and educating individuals who enact and/or enforce local zoning ordinances of the role and need for family day care and that all family day care should be considered a use permitted by right for a residence."[60]

Because each town, village and city enacts and enforces its own zoning ordinances, this may be a formidable educational task. Without a decision by the State Court of Appeals or State legislation that specifically preempts local

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59 SSL 390-a(7).

60 Chapter 804 of the Laws of New York 1985; SSL 390-a 2.(a)(v)(vi).

zoning boards from enacting ordinances which interfere with the right of family day care providers to exist in residential neighborhoods some local zoning boards will continue to challenge them.

F. New York City Regulation of Family Day Care

It is estimated that there are 100,000 very young children in family day care homes in New York City. For parents of children under three, family day care may be the only child care available outside the home.61 Yet, there are only 104 licensed homes available to parents whose children are not eligible for subsidized care as compared to 1880 family day care homes available for children eligible for subsidized care. The majority of children in need of day care are ineligible for subsidized care. Even for those who are eligible for subsidized care, only a small fraction are able to obtain it.

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61 Child Care Inc., Recommendations of the New York City Family Day Care Task Force for a Coordinated System to Monitor, Train and Provide Support Services to Independent Family Day Care Providers, 1985.

1. The Dual System for Regulating Family Day Care in New York City

Consistent with state legislation exempting non-subsidized day care in New York City from state regulation, the City Department of Health regulates non-subsidized family day care under the City Health Code, while the Agency for Child Development (ACD), a division of the New York City Human Resources Administration, certifies all subsidized family day care providers. Homes certified by ACD are maintained exclusively for subsidized care. Thus, in New York City there are two entirely separate agencies responsible for family day care, and two very different sets of regulations and standards for certification of family day care homes. Existence of a separate regulatory system for non-subsidized care in the city, distinct from state regulation, only exacerbates a situation already fraught with complexities.

2. The Regulatory Framework in New York City

a. Subsidized Care: The "Authorized Agencies"

The Agency for Child Development (ACD) subcontracts with approximately 55 agencies that provide outreach, public education, technical assistance, training, monitoring, supervision and placement of children eligible for subsidized day care. These sponsoring agencies include 35 "Clusters," affiliated with day care centers, 20 "Career Programs," that are independent, private not for profit agencies, and 11 "authorized" voluntary child care agencies. ACD certifies all subsidized family day care homes except those certified directly by the 11 voluntary authorized child care agencies which are empowered by state law to issue "certificates" to family day care homes under their supervision. With the exception of a small demonstration project, all homes certified by ACD and voluntary child welfare agencies in New York City are exclusively maintained for children who receive subsidized family day care. There are

currently 1880 certified family day care homes in New York City.[62]

b. Non-Subsidized Family Day Care in New York City

Other than a small pilot project supported by American Express to establish family day care systems for working parents whose children are not eligible for subsidized care,[63] all non-subsidized family day care in New York City is regulated by The Department of Health. One staff person from the New York City Department of Health is assigned to certify the estimated 25,000 family day care homes providing non-subsidized care to an estimated 100,000 children of working parents.[64] As a result, only one hundred and four of those homes are certified.

(1) Standards for Family Day Care Certification Under the New York City Health Code

The legal standards for the regulation of non-subsidized family day care homes are found in Part 53 of the Health Code of the City of New York. They are substantially different from the state standards governing all

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62 NYS Department of Social Services, Recap of Permits Issued and Certificates Approved, November, 1985. See Chart 1.

63 The pilot project represents an interesting model for certifying family day care for working parents. Administered by Child Care, Inc. and supported by American Express, two authorized child welfare agencies are attempting to develop family day care systems that will be responsible for outreach, recruitment, training, monitoring and certification of family day care homes for children who are not entitled to subsidized care. Since these authorized agencies are empowered pursuant to state law to license family day care homes for children received through their agencies, they offer a basis for developing self sufficient and potentially self supporting family day care systems for working parents. Under the current regulatory scheme, authorized agencies stand in a unique position to offer the gamut of services necessary to provide regulated, quality family day care to working parents who are not eligible for subsidized care.
By granting licensing authority to selected programs under the 1985 pilot project for the expansion of family day care, this model may be expanded to private not for profit agencies. See p. 26-29.

64 Child Care Inc., New York City Task Force Report, p 2.

subsidized family day care in New York City and family day care throughout the state.

Family day care under the City Health Code is limited to the care of five children, while subsidized family day care in New York City under state social services regulations, allows for up to six children.[65] Although obviously unenforceable, the City Health Code mandates that any person caring for even one child under the age of two obtain a Certificate of Approval. In contrast, a person may provide care for as many as five children, two years of age or older without any regulation whatsoever under the Health Code.[66] Similar to state regulations, the City Health Code prohibits the care of more than two children under the age of two in a family day care home. Unlike the State's prohibition against the care of more than two children in a home without annual home inspections and certification, the City Health Code does not regulate or establish any mandatory standards to family day care homes providing care for up to five children. Instead, a person caring for up to five children two years of age or older, may **voluntarily** apply to the Health Department for a Certificate of Approval but is not required to do so.[67] (Emphasis added.)

Similar to state regulations, the City Health Code requires documentation of the health of the prospective provider and all members of the provider's household. There are also standards for the physical plant, nutrition, health, safety and sanitation. The Department of Health subcontracts with three

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[65] Health Code 53.01. In contrast, regulations of the State Department of Social Services allow family day care homes an upper limit of six children. 8 NYCRR 417.1(b).

[66] New York City Health Code 53.03.

[67] New York City Health Code 53.05. (Emphasis added).

"networks" that provide support services to family day care providers who are certified.[68] In addition to meeting the published standards for family day care, the Health Department has adopted a policy of granting a Certificate of Approval only to providers who join one of the family day care "networks." Although home visits are not required under the Health Code, a representative of the Department of Health accompanies a network staff person to make a home inspection prior to granting a certificate of approval. Given these informal policies requiring network affiliation and a home inspection by a representative of the Health Department and the lack of networks and staff to perform these functions, it is hardly surprising that there are so few certified homes for non-subsidized children in New York City.

3. The Group Family Day Care Pilot Project

When the final report on the Group Family Day Care Demonstration Project was submitted to the State Legislature by the State Department of Social Services there were three licensed group family day care homes in New York City. The State is seeking to certify additional homes during the current year as part of the 1986 expanded project.

After some discussion about which agency would certify providers under the pilot project, it was agreed initially among City Health Department officials that the State Department of Social Services regional metropolitan office would certify group family day care projects pursuant to State guidelines. Even though the guidelines state that "where local fire, health and building departments require their approval, the provider shall obtain such approval," a Fire Safety Representative from the State Department of Social

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[68] These organizations are the 92nd Street YMCA, the Church of the Living Hope in East Harlem, and the Church of the Open Door in Brooklyn.

Services performs fire inspections for group family day care in New York City, applying the broad state guidelines for group family day care. State fire guidelines for group family day care are almost identical to the fire and safety regulations governing family day care and similarly provide that:

> "(12) Children shall be cared for only on such floors as are provided with readily accessible alternate means of egress which are remote from each other." 69

This particular provision has been interpreted by a Fire Inspector from the Department of Social Services to exclude fire escapes as approved exits. Such an interpretation poses obvious problems for both family day care and group family day care in New York City, because virtually all apartments above the ground floor would be eliminated as sites for family day care homes.

The regulatory problems for group family day care in New York City are particularly complicated because the City Health Code classifies anyone caring for more than five children in New York City as a "day care service."70 In order to provide "day care services," the City requires either a certificate of occupancy or approval from the Buildings Department that the day care premises comply with all applicable building laws, in addition to an inspection

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69 Family Day Care Fire and Safety standards are found at 18 NYCRR 417.8. Group family day care Fire and Safety standards are in the Guidelines : Group Family Day Care Demonstration Homes. In addition to those standards which apply to family day care, group family day care guidelines also include provisions for radiator and pipe covers, specify the type and location of fire extinguishers, require proper maintenance of boilers, furnaces and wood burning stoves, require the home to have an available telephone and child proof covers for all electrical outlets.

70 "Day care services means any service which during all or part of the day regularly gives care to six or more children, not of common parentage, who are under six years of age, whether or not the care is given for compensation, whether or not it has a stated educational purpose and whether the service is known as a child care center, day nursery, day care agency, nursery school, kindergarten, play school, progressive school or by any other name...." New York City Health Code 45.01.

by the City Fire Department finding that the day care premises meet all applicable laws and regulations for fire control.71 The City Division of Fire Prevention and the Buildings Department72 has promulgated detailed building and fire prevention requirements for day care services that would preclude the licensing of group family day care which takes place in a home.73 Whether or not group family day care is exempted from state regulation, it will be necessary for City Building, Fire, and Health Department officials to adopt a definition and use classification for group family day care which addresses fire and safety concerns and recognizes it as a unique and separate category of care available to families in the City.

There is some question whether the New York City Department of Health should regulate group family day care under its day care services standards, or whether the State Department of Social Services guidelines should apply. As a result, prospective group family day care providers are in the middle, apparently caught between two sets of standards and two different agencies with perceived authority to regulate and enforce standards for the group home pilot project. As a representative of a city based organization called In Home Group Care - Advocates for Licensing, testified at a recent public hearing:

> " The Department of Health is conducting an intensive sweep of unlicensed centers in the city. Many of our members are being

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71 Health Code of the City of New York, Section 4704.

72 The Building Code has a category referred to as a "Neighborhood Family Care Center," which is not defined. It falls under the use occupancy of a business.

73 A day care service as defined in the Health Code is classified as an "institution" under the City Building Code. Much higher fire and safety standards apply to institutional, as opposed to residential, occupancy classifications, so group family day care in a home would be virtually eliminated as a child care option in the city.

accused of being family day care homes with too many children or unlicensed centers. We are faced with stiff penalties and frightening administrative tribunals."

Because the City Health Code and Fire Prevention Code do not have a category of child care to coincide with the state group family day care project, and the State has not adopted comprehensive fire and safety standards to apply specifically to group family day care homes, the situation in New York City can only be characterized by its confusion. Because the group family day care project in New York City is plagued by multiple agency regulation without clarification of which agency is ultimately responsible for its regulation, group family day care has been all but eliminated as a viable child care option in New York City.

4. New York City Zoning and Family Day Care

Obtaining a Certificate of Occupancy or a statement of approval from the Building Department for day care services may be difficult, especially if zoning issues are raised. The Zoning Resolution of New York City defines home occupations as those which are:

> "(a) clearly incidental to or secondary to the residential use of a dwelling unit or rooming unit, and
> (b) carried on within a dwelling unit, rooming unit, or accessory building by one or more occupants of such dwelling unit or rooming unit, except that, in connection with the practice of a profession, one person not residing in such dwelling unit or rooming unit may be employed, and
> (c) Occupies not more than 25 percent of the total floor area of such dwelling unit or rooming unit and in no event more than 500 feet of the floor area."74

The definition specifically includes some home occupations and prohibits others.75 Family day care does not appear in the definition. Given the

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74 Zoning Resolution, City of New York, Section 12-10 (Amended 1961).

75 The definition of home occupation in New York City includes the teaching of no more than four pupils simultaneously, as well as fine arts studios and professional offices. NYC Zoning Resolution {12-10(c).

requirement for "adequate space [in the group family day care home] for the provision of age appropriate activities and the safety of children,"[76] and the limitation that only 25 percent of the floorspace be utilized in a home occupation, a potential conflict exists. An additional conflict exists between the requirement under the City Health Code for a minimum of "30 square feet of wall to wall space for each child " [77] in a family day care home, and the space limitation adopted in the definition of home occupation under the zoning resolution. A provider might argue that no specific floor space is committed to the day care use, because it is used exactly as a home without need for an office or special equipment. Nonetheless, there remains an obvious need to amend the zoning resolution to include **licensed** family day care and group family day care in the definition of home occupation.

5. Landlord - Tenant Leases and Family Day Care

For providers who do not own their homes, landlord and tenant law applies to the operation of a family day care home. The right to quiet enjoyment of the premises which the tenant acquires by lease includes most of the rights which the owner (landlord) would have enjoyed.[78] In the absence of specific restrictions found in the lease, the general rule is that a tenant may occupy the premises in any lawful way for which they are intended. In a holdover proceeding to evict a certified family day care provider from her apartment in Bronx County for alleged violation of the terms of the tenancy, the court held that "the care of six young children for

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[76] New York State Department of Social Services Guidelines: Group Family Day Care Demonstration Homes, Physical Plants, (3).

[77] Health Code of the City of New York, Section 53.13(b).

[78] People v. Scott, 309 NYS 2nd 919, 26 NY 2nd 286, 258 NE 2nd 206.

remuneration did not constitute a substantial violation of the tenancy."79 Thus, where there is no specific provision to the contrary in the lease, a licensed family day care home should pose no problems in the context of the private landlord tenant relationship. Moreover, if a lease purports to exclude a family day care home, it might be void as a matter of public policy.80 Of course, a landlord retains the customary remedies if a tenant causes disruption or serious nuisance. This may present problems for group family day care homes, where as many as fourteen children are permitted.

6. The Need to Consider Alternatives

The New York City Health Code needs to be revised to meet the needs for regulated quality care options for working parents. The present voluntary registration system without tangible incentives is equivalent to having no regulatory system at all. For all but the few family day care homes that are certified, non-subsidized family day care in New York City is unregulated. The Health Code fails to require any standards or regulation of the majority of non-subsidized family day care homes. A system that does not even require mandatory registration leaves the vast majority of family day care providers invisible and inaccessible to parents who turn to the CCRRs or to the child care networks to assist them in their search for child care. At the other extreme, the requirement that every person caring for even one child under the age of two obtain a certificate is unrealistic and unenforceable.

Whatever revisions are considered, there is no practical reason for New

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79 Vittorio Properties Inc. v. Alprin, 324 NYS 2nd 152, (Civ. Ct. Bronx Co. 1971).

80 Where public policy was thwarted, real property deed restrictions were void in Crane Neck Association v. N.Y. City \ Long Island City, 472 NYS 2nd 901 (1984).

York City to have standards that are different from state standards. Unlike the present system, a universal regulatory system would ensure that standards and services apply equally to all children regardless of income eligibility. This should be a major goal of any regulatory reform.

If group family day care is to become a viable child care option in New York City, then Health Code regulations must be adopted that provide definitions and standards for group family day care as an intermediate category of care between "family day care" and "day care services." In addition, the need to develop Fire Safety Regulations for group family day care is quite clear. Because the fire and safety issues in New York City may be different from those in the rest of the state, the City might need higher standards for group family day care. A task force consisting of officials from the New York City Health, Building and Fire Departments, the State Department of Social Services, and the State Division of Housing and Community Renewal may develop uniform fire and safety standards that will apply to all group family day care in the State. In order to unravel the bureaucratic nightmare that the group family day care project has become in New York City, the State Department of Social Services needs to seek a waiver from the City to enable the State to regulate the group family day care project. Until the Health Code is amended to include a definition of group family day care that recognizes that this type of care takes place in a home and is distinct from day care services, the problems of group family day care for New York City will not be resolved. For further recommendations on Group Family Day Care see Part IV, Section C.3 of "Recommendations for Improving the Present System: Making Group Family Day Care a Permanent Option."

For specific recommendations regarding the revision of the Health Code, the reader is referred to the Recommendations of the New York City Task Force for a Coordinated System to Monitor, Train and Provide Support Services to Independent Family Day Care Providers. These detailed recommendations are the result of the coordinated efforts of providers, educators and government policy makers working to develop a system that is more responsive to the need for regulated quality family day care in New York City.

PART III

MUNICIPAL ZONING AND FAMILY DAY CARE

A. Regulatory Framework: Municipal Zoning and Family Day Care

The State law and regulations that govern licensed family day care do not require any approval by municipal zoning officials.[81] Zoning requirements for family day care appear to be a matter of local invention.

There is only one reference to municipal zoning in the family day care legislation. Significantly, it addresses the problem of municipal zoning law interference with family day care providers. It recognizes the importance to the State of increasing the availability of family day care, and it authorizes funds for

> "educating individuals who enact and/or enforce municipal zoning ordinances of the role and need for family day care **and that all licensed family day care programs should be considered a use permitted by right for a residence.**" 82 (Emphasis added).

Notwithstanding the express intent of the Legislature to encourage municipalities to treat family day care homes the same as any other residence,

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81 Regulations of the State Department of Social Services specifically require municipal zoning approval for day care centers. 18 NYCRR {418.4(a)(1). This distinction is consistent with the state policy not to subject family day care to municipal zoning ordinances.

There is but one oblique reference in the State regulations to municipal regulation of family day care. It does not require any zoning approvals, but merely requires "a statement from an appropriate official or authority that the dwelling meets standards for sanitation and safety where local fire, health and/or building code authorities require approval." 18 NYCRR 417.3(d). If family day care homes were treated as any other single family unit, they would only be required to obtain a statement, such as a certificate of occupancy, if all homes in the community are required to have them.

82 Chapter 804 of the Laws of New York 1985; Social Services Law 390-a 2.(a)(v)(vi).

some municipalities still pass zoning laws that purport to restrict the homes. There is no decision by the State's highest court prohibiting municipalities from attempting to regulate in the area, and it is therefore quite likely that this issue will continue to be litigated. Accordingly, an examination of the municipal zoning power is in order.

B. An Overview of Municipal Zoning Powers

The authority of municipal government to enact zoning regulations is not inherent; it must be derived from powers granted either by the State Constitution or by a delegation of power from the State Legislature. The New York State Constitution grants the State Legislature the power to enact legislation that bears some reasonable relationship to public health, safety, morals or welfare.[83] This broad power is known as the "police power." The New York State Legislature granted some of that power to municipal government through the Statute of Local Governments and the Municipal Home Rule Law.

The "home rule" authority is limited. The powers granted under the Statute of Local Governments "shall at all times be subject to such purposes, standards and procedures as the legislature may have heretofore prescribed or may hereafter prescribe."[84] The State Legislature adopted zoning enabling legislation for cities, towns and villages, delegating the chore of making land use decisions to local government, but retained the power to enact its own land use legislation. State legislation that regulates land use may be enacted

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[83] N.Y. Const. Art 3.1.

[84] Statute of Local Government, §104.

after it is adopted in two sessions in matters of overriding state concern.85

The State's authority to impose comprehensive land use regulations is not often exercised; indeed, there is no model state zoning code for municipalities to consider.86 This approach to land use regulation, delegation to municipalities, has led to a lack of low and moderate income housing in many communities, obstacles to the establishment of community residences for special populations,87 and impediments to the establishment of licensed family day care homes.

Advocates for family day care providers have three basic arguments against municipal zoning impediments:

1. The provision of family day care in one's home is as much a customary home occupation as other professions which traditionally

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85 Wambat Realty Corp. v. State, 41 NY2nd 490, 393 NYS2nd 949, 362 NE2nd 581 (1977).

86 The Legislature has adopted a comprehensive model building and fire code, which has been adopted voluntarily by municipalities. Executive Law §370 et seq; Regulations of New York State Division of Housing, at 9 NYCRR 600 et seq and 1150 et seq. However, the code specifically provides that no provision of it will be construed to "repeal, modify or constitute an alternative to any lawful zoning requirement which is more restrictive than the code."

87 There are numerous cases where the zoning power of the municipality to place restrictions on residential land use is limited by an overriding state concern or where a particular function is found to fulfill a policy of the State. In a per curiam decision, the Court of Appeals held that a municipal zoning ordinance restricting an area to one family residences could not be applied to a nonsecure detention center for persons in need of supervision, where a state statute authorizes and requires a county to provide adequate facilities of the type described despite any conflicting law or municipal ordinance." People v. St. Agatha Home, 47 NY 2nd 46, 49, 416 NYS 2nd 577, 389 2nd 1098 (1979), cert denied 444 US 869 62,100 S. Ct. 145. In a similar case upholding the rights of mentally retarded persons to live together despite a restrictive covenant which limited buildings to single family dwellings, the Court of Appeals held that the state's interest in protecting the general good through social welfare legislation is paramount to the interests of parties in private contracts. Crane Neck Ass'n v. N.Y. City\Long Island City, 472 NYS 2nd 901 (1984).

are exempted from residential zoning requirements.

2. The family day care home qualifies for the traditional partial exemption accorded to schools and nursery schools.

3. The Legislature has overridden local zoning in this area.

Because of the seriousness of the problem, each of these arguments is set forth below in detail.

C. Is Family Day Care A Customary Home Occupation?

Most municipal zoning ordinances include a minimum of three residential districts - a single family district, a two-family district, and a multiple residence district. Single family residential districts usually allow for some nonresidential, "accessory" uses of property.88

The historical use of one's personal residence for business purposes predates the advent of municipal zoning regulations. It was not uncommon for professionals, owners of small businesses, and tradesmen to conduct business from their homes. Municipal zoning ordinances now regulate these activities in order to protect the residential character of neighborhoods from encroaching commercial development. Limitations on "accessory" uses, "customary home occupations," and "use permits" are now common. Each municipality can adopt its own definitions for these terms. Most zoning ordinances list the types of home occupations specifically permitted or excluded in different residential districts. Some limit the number of persons who may be employed in a home occupation, others limit the total amount of floor space, or the percentage of the total floor space of the residential building which may be utilized for the home occupation. Other municipal laws may require that a "use permit" or

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88 Two family districts and multiple family districts usually include all uses permitted in a single family and two family district, respectively.

"variance" be granted by a local zoning board.

The definition of accessory use adopted in the regulations of the Uniform State Building and Fire Code is typical:

> "A use, occupancy or tenancy customarily incidental to the principal use or occupancy of a building. In a multiple dwelling, such accessory uses may include, among others, the following:
> (i) offices for the building management;
> (ii) dining rooms, banquet rooms, public kitchens, and ballrooms
> (iii) recreation and play rooms..." 89

Most zoning laws permit the establishment of professional offices as home occupations or accessory uses. Typically, this allows doctors, dentists, surgeons, veterinarians, lawyers, engineers, architects and accountants to have a home office. If a zoning law does not specifically include or exclude a particular occupation, the courts will determine whether the occupation is a customary home occupation within the meaning of a local ordinance.

Care for neighborhood children in one's home is certainly nothing new. - The change in modern times is that more mothers are working and family day care is now licensed under state law. There is little difference between family day care and a large family in terms of its impact on the neighborhood. The very reason family day care has become such a popular choice among parents of young children is because of the individualized attention given to the child in a secure, nurturing environment - a family setting similar to the child's own home.

The provision of family day care in one's home is secondary or incidental to the use of the home as a primary residence for the provider's family. In contrast to professions like law or dentistry, which require private office space or equipment, a family day care home usually requires no special

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89 9 NYCRR 606.3(2).

construction or alteration to the premises. And it can not be said that caring for children changes the residential character of the neighborhood in any significant way. The impact of a family day care home on the community is almost indistinguishable from a large family. After all, the same number of children would still be somewhere in the community no matter where they receive day care.[90] It does not create any unusual traffic or noise problems. Indeed, there may be less disturbance than usually associated with the comings and goings of patients, customers and clients of the traditional home occupations and professions. As a matter of common sense, it seems ludicrous to consider family day care as anything but a customary home occupation.

There do not appear to be any reported court decisions in New York State that address whether family day care is a customary home occupation. The Court of Appeals of the State of Michigan has decided the issue. It held that where a homeowner cared for no more than seven unrelated preschool children in compliance with state regulations, in the same manner in which the provider cared for her own children, where the only observable factor which would indicate the homeowner did not simply have a large family was traffic in the morning and afternoon, and where public policy was in favor of family day care homes, "the [provider was] using [her] property for residential purposes when caring for children." [91]

There is strong common sense appeal to making this argument, but it is fraught with problems. First, many zoning ordinances require a "use permit"

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[90] This may be the heart of the issue. Some communities may seek to reduce school taxes by creating a climate that discourages working parents with children.

[91] Beverly Island Association v. Zinger, 317 N.W.2nd 615, (Michigan Court of Appeals 1982).

or a variance for home occupations. This could mean onerous applications, hearings, evening meetings, delays, opportunities for disgruntled neighbors to use the zoning board to air their grievances against the provider, and legal fees. Second, the zoning board might condition the grant of a permit upon a certain number of off-street parking spaces, inspections by other local officials, or other costly and delaying procedures. Third, the legal question whether family day care is a customary home occupation will depend in part on the definition found in the particular zoning ordinance. If a request for a use permit is denied by a local zoning board, a reviewing court may give much weight to the zoning board's interpretation of the local zoning law. This litigation risk is particularly hazardous, because there is no definitive guidance from the New York appellate courts. Family day care providers thinking about requesting a home occupation use permit from local zoning authorities should first seek the advice of an attorney.

D. Does Family Day Care Fall Within the Usual Exemptions for Schools and Nursery Schools?

The courts have overturned municipal zoning restrictions on land that is used for educational purposes. If a family day care home is treated as a school or nursery school, could local zoning restrictions be avoided? Because the experience given children in family day care homes has a significant educational component, this avenue of judicial relief from local zoning laws is worth exploration.

The zoning rules that have been applied to schools may apply equally to family day care, and the municipality's authority to regulate it may be similarly limited. In a case decided in Westchester County, a preschool program for fourteen children in a home was held to be a school, and could not be

excluded from a residential zone. The court said:

> "the value of preschools to children can hardly be questioned by anyone whose children have attended a well-run school of this character. To limit the existence of such schools to the definition given in the Education Law would mean that such schooling would be available only to children of parents in higher income brackets [who] live in a larger center of population."[92]

In Merrick Community Nursery School v. Young, [93] the court ruled that a zoning ordinance which excluded nursery schools from residential districts was invalid because it bore no reasonable relation to the public health, safety, morals or general welfare of the community.[94] If a nursery school is exempt from local zoning laws, as the Merrick case seems to suggest, then the smaller and less conspicuous family day care homes also should be exempt.

Although there is appellate authority for the proposition that schools are not subject to local zoning regulation,[95] a case could turn on the particular language of a local zoning ordinance.[96] Before family day care providers argue that they should be treated as nursery schools by local zoning officials,

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92 People v. Collins, 191 Misc 553, 555, 83 NYS 2nd 124,126 (Sup. Ct. Westchester County 1948).

93 11 Misc 2nd 576, 171 NYS 2nd 522 (1958). The Court of Appeals held in Concordia Collegiate Inst. v. Miller, that an ordinance which "virtually bars schools ... from the village," was an impermissible exercise of local zoning powers because "an educational use ... is clearly in furtherance of the health, safety, moral and general welfare of the community; and is under the direct supervision, care and concern of the state itself. Zoning ordinances must find their justification in the police power exercised in the interest of the public." Id.

94 11 Misc 2nd 576, 171 NYS 2nd 522 (1958).

95 Union Free School Dist. v. Hewlett Bay Park, 198 Misc 2nd 932, 102 NYS 2nd 81 (1950), aff'd 278 AD 706, 103 NYS2nd 831.

96 See Childspace v. Village of Croton On Hudson, where the court upheld a village's interpretation of its zoning law that precluded schools from certain areas, denying a day care center a permit.

some further cautions are in order. Even schools may be subject to some regulation by local zoning officials. And they may need a permit conditioned upon local standards. The wording of a local ordinance may restrict schools in certain neighborhoods, for example, where streets are too narrow for emergency equipment. While the locality may not zone a school completely out of the community, it might channel its location to certain preferred areas. Obviously this approach has its limitations for providers who use their own homes. And it may still involve the time and expense of attending local zoning meetings, making applications, hiring counsel, and meeting extraneous criteria that may be contained in a local zoning code. The argument may be more useful to the nursery school, the group family day care home, and even day care centers that have a more pronounced impact on a neighborhood than the typical family day care home.

E. Is Family Day Care Exempt From Municipal Zoning Laws Because the Provision of Licensed Family Day Care to Children of Working Parents is a Matter of Overriding State Concern?

Can an argument be made successfully that local zoning boards have no jurisdiction at all to regulate family day care? The Legislature has acknowledged that the delegation of land use control to the municipalities frustrates overriding state concerns in some instances. In such matters, the Legislature has limited the municipalities' role in the planning and regulatory process.[97] For example, zoning enabling legislation precludes the municipal

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97 For example, New York State exercised its land use control power in the enactment of the Padavan Law, which established a procedure for selecting residential homes for the mentally disabled. N.Y. Mental Hygiene Law, §41.34. The legislation also established that "a community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances." N.Y. Mental Hygiene Law, §41.34 (e).

power to regulate the uses of land when there is evidence of an overriding state concern, or when a municipal law is inconsistent with any State enactment. In a recent unanimous decision, the New York State Court of Appeals annulled a municipal effort to regulate the site for a new power plant, and reviewed the state law as follows:

> "[The local law] is invalid because the Legislature has pre-empted such regulation in the field .... The intent to preempt need not be express. It is enough that the Legislature has impliedly evinced its desire to do so.sa[Citation omitted] A desire to preempt may be implied from a declaration of State policy by the Legislature [citation omitted] or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area."

Con Ed v. Town Of Red Hook, 60 NY2nd 99, at 105 (1983). Under this standard enunciated by the State's highest tribunal, it is arguable that there is no room for any municipal regulation of licensed family day care.98 Accordingly, the tests of the Con Ed case need to be examined in detail.

1. A Desire to Preempt May Be Implied from Legislative Policy Declarations That Establish Day Care as a Matter of Overriding State Concern

There may be enough statements made by the Legislature to establish that the availability of licensed family day care for children of working parents has become so important to the State that a municipality may not regulate it. A similar argument prevailed for a day care center in Nassau county. In that case a church could not be required to obtain a special use permit to operate a day care center. The court said:

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98 Under its police powers, a municipality might make the operation of an unlicensed family day care home a violation of its laws. This would encourage provider compliance and would not interfere with the State scheme.

> "Municipal corporations are creatures of, and have only such powers as are delegated to them by, the State...." The court concluded that a village zoning ordinance, which "conflicts and hinders an overriding State law and policy favoring the care of children, is void as exceeding the authority vested in the Village." 99

As evidence of an overriding state policy to promote the availability of day care for children, Judge Bernard Meyer, now on the Court of Appeals, cited legislative history which stated:

> "There is a serious shortage throughout the state of facilities suitable for use for the care of children of pre-school and primary school age whose parents are unable to provide such care for all or a substantial portion of the day or post-school day.....The absence of adequate day care facilities is contrary to the interest of the people of the state, is detrimental to the health and welfare of the child and his parents, and prevents the gainful employment of persons who are otherwise qualified because of the need to provide such care in their homes during the day time hours." 100

As further evidence of an overriding state concern Judge Meyer cited the Youth Facilities Project Guarantee Fund Act in the Social Services Law, which states:

> " Insofar as the provisions of this act are inconsistent with the provisions of any other law, general, special or local, the provisions of this act shall be controlling." 101

In the most recent case to challenge the authority of a municipal zoning board to exclude a family day care provider from a residential zone, the Village Court of Croton on Hudson held:

> " There is no question that the care of children of parents who must both work or of a single parent who must work is of great state concern, in my opinion, more so than for example the construction of quarter horse race tracks, [citation omitted] or the

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99 Unitarian Universalist Church v. Shorten, 63 Misc 2nd 978, 314 NYS 2d 66, 69 (Sup. Ct. Nassau Co. 1970).

100 Unitarian Church v. Shorten, supra, citing N.Y. Session Laws, 1969, Chapter 1013.

101 Social Services Law, {410.16.

> conservation of freshwater wetlands [citation omitted]. Where there is a great degree of State concern, notwithstanding a high degree of local concern, State power is paramount; [citation omitted] the statute in question herein 'serve(s) a supervening State concern transcending local interests.' Wambat Realty Corp. v. State of New York, 41 NY 2nd 490." 102

In the cases discussed above, the courts found sufficient evidence of an overriding state concern in the area of family day care to stop local zoning authorities from excluding or regulating family day care in residential communities. There is even more evidence of overriding state concern today. This can be found in recently enacted legislation for alternative approaches to the development of day care services. The legislative findings and declaration of purpose provide strong evidence of state concern about day care. The Legislature stated:

> "...there is a growing need to expand the availability and accessibility of safe, affordable and quality day care services for children."

The amendment also provides grants to child care programs for "the education of local officials on the importance of including family day care in residential neighborhoods as a matter of right." 103

Finally, evidence of a State agency's policy to regard family day care as a residential use can be found in a ruling of the Commissioner of the Division of Housing and Community Renewal. When asked whether a family day care home changes the use classification of the premises under the Uniform Building Code, the Commissioner stated:

> "the occupancy classification of a Group A1 single family dwelling is not changed where family day care is provided in accordance with

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102 State of New York v. Kennelly, (Village Justice Court, Croton on Hudson, N. Y., May 23, 1985)(Adami, J.).

103 1985 Laws of New York, Chapter 804; Social Services Law 390(a) 2(v)(vi).

the requirements of N.Y.S. Department of Social Services regulation."[104]

In sum, there is sufficient evidence that the State has an overriding concern for the provision of family day care and this bars municipalities from creating regulatory barriers.

2. A Desire to Preempt May be Implied from the Fact the Legislature has Enacted a Comprehensive and Detailed Regulatory Scheme for Family Day Care

The alternative test of the Con Ed v. Red Hook case may also be satisfied, because the comprehensive State regulatory scheme that governs licensed family day care should preempt municipal attempts to regulate or exclude family day care from residential neighborhoods through the exercise of zoning or other powers.

The statutory scheme for family day care is sufficiently complete to meet the test. It covers health, safety, sanitation, and quality. It deals with all aspects of licensing. Further regulation by municipalities only deters people from complying with the State licensing scheme. With cumbersome and possibly insurmountable zoning barriers to the provision of licensed family day care, providers go into the unregulated, unlicensed and unsupervised "underground." The purpose of State approval and licensing family day care homes is undermined, and the availability of quality, licensed family day care is reduced. This diminishes the quality of life for children and parents and the economic wellbeing of the community.

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104 New York State Division of Housing and Community Renewal, Commissioner's interpretation No. C1-161, Code Section No. 701.

PART IV

EVALUATION OF ALTERNATIVES, FINDINGS AND RECOMMENDATIONS

Any regulatory system for family day care should further two major goals: (1) to make licensed family day care accessible to all children who need it, and (2) to protect children by establishing and enforcing minimum health, safety and quality standards.

In New York State, more than forty years of regulation have produced perhaps three hundred eighty licensed homes for non-subsidized care and only a small fraction of certified homes needed to meet the demand for subsidized child care. Thus grind the engines of our bureaucracies, leaving the vast majority of non-subsidized providers unlicensed and the majority of children eligible for subsidized child care unserved. With the growing need for family day care in New York State and the shortage of licensed family day care homes, the potential of the current regulatory scheme to meet the above goals must be reexamined.

From the responses of child care advocates and government officials, it is clear that the primary barrier to provider participation in the system lies in the regulatory system itself. The allocation of more funds or the assignment of additional staff alone will not solve the problem. Without regulatory reform, parents, providers, professional staff and licensing agencies will continue to struggle with the structural problems identified in this study.

Some of the reasons for the small number of licensed family day care homes are apparent:

1) There is widespread ignorance of the laws governing family daycare. The majority of providers are either unaware or flagrantly violating the law.

Without any genuine commitment on the part of government to educate the public or even to enforce the licensing laws, this is hardly surprising.

2) The current system offers few incentives for family day care providers to seek certification. Indeed, licensed providers, once publicly known, may become targets of municipal prosecutions for alleged zoning, building, fire and health violations.

3) Getting through the regulatory maze is a formidable task and a disincentive to becoming licensed. As a result, many providers give up after the initial inquiry.

4) The state has not committed sufficient personnel to the task of licensing non-subsidized family day care.

5) There are no meaningful penalties or other realistic sanctions for enforcement of the family day care licensing laws. [105]

If full enforcement became a goal, the cost of enforcement under the existing scheme, which requires prior home inspections and annual renewal inspections of every licensed home, would be excessive.

A. Exploring Alternatives

Instead of placing sole responsibility for regulating family day care on the State, any regulatory reform should strive toward the development of a "regulatory partnership" among the key participants: parents, providers, and the private not for profit Child Care Resource and Referral agencies. To accomplish its goals, each of the vital players in the regulatory system would have to assume certain clearly defined and realistic goals.

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105 The only enforcement mechanism is for the Commissioner of Social Services to commence an action in State Supreme Court enjoining a family day care provider from operating a family day care home in violation of the law. (SSL 391). Obtaining an injunction may be appropriate in those cases where the threat of imminent harm exists.

The Role of the State

Because total deregulation would deny children and parents minimal protections, we must continue to look to the State to establish and enforce regulations for family day care. To ensure that all children receive licensed care, the state must strive to maintain a delicate balance between under-regulation that fails to protect the children it seeks to protect and over-regulation that makes licensed care almost unobtainable, depriving children of licensed care altogether.

The regulatory framework appropriate to family day care must reflect the fact that family day care takes place in a home. As one of the experts on family day care regulation observed,

> "overformal regulation, however well done, may destroy the genuineness of family life shared with children in family day care, creating homelike institutions rather than sharing real homes."106

Thus, child care advocates should continue to look to the state to adopt a regulatory framework which establishes uniform and realistic standards for the protection of all children in family day care homes. Obtaining a license should be simple for the qualified provider. As long as the licensing system remains cumbersome it will deter provider compliance with the law.

A realistic commitment to full enforcement of its regulatory scheme is essential. At a minimum, this requires a commitment to educating the public about its laws. It means hiring sufficient staff to perform the licensing function. It also requires that the legislature adopt language to ensure that licensed family day care is synonymous with legitimacy. Without legislation to protect licensed family day care from improper local regulation, licensed family

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106 Morgan, Gwen, Can Quality Day Care Be Achieved through Regulation, in Advances in Early Education and Day Care, Vol. 1, 1980.

day care providers will continue to face the same prosecution and harassment by local officials as unlicensed providers. State legislation should be enacted to ensure that licensed providers are able to obtain liability insurance at reasonable cost.107 Tax incentives such as home business deductions, should be strictly limited to licensed providers. Governmental subsidies and benefits should be available and limited to licensed providers. Tangible incentives and meaningful sanctions will encourage providers to enter the regulatory system. For providers who do not follow the law, simple enforcement procedures including warnings, summons, appearance tickets, fines, and cease and desist orders in emergencies, should be put in place.

The Department of Social Services, as a governmental agency, is in the best position to access the Child Abuse Registry, to complete criminal record checks, and to investigate complaints. The State needs to establish a highly visible, accessible mechanism for filing complaints with a coordinated system for investigation, record keeping, and updating information. One way to do this might be with two state "800" numbers, one for family day care information for parents and providers and another for complaints.

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107 The cost of liability insurance for family day care homes is becoming prohibitive, if available at all. Some states have started to take action. In Washington and Maryland, the Insurance Commissioners issued emergency directives making it an unfair practice for insurance companies to cancel or refuse to renew homeowner's policies because the homeowner provides family day care.

In California, a bill was introduced that would create a state administered self insurance program. The California Child Care Project of the Public Counsel's Office filed a lawsuit against a California company that cancelled homeowner's policies because child care was being offered in the home.

The New York State Insurance Department has met with day care professionals who are seeking to establish an assistance plan to help providers unable to secure insurance with the names of underwriters who are continuing to offer policies for day care. However, if the crisis cannot be resolved informally in New York State, it may be necessary to enact state legislation to create an assigned risk plan to protect licensed family day care providers similar to the one established to protect licensed drivers.

In addition to a simple complaint procedure, the State needs to develop educational materials to help parents using family day care to become informed consumers. These materials should explain family day care standards in a simple manner and educate parents of the respective role of the State and parents in protecting the health, safety and welfare of all children in care. A simple checklist to be completed by the parent and sent back to the licensing agency would be an inexpensive and effective way to enlist parent involvement in family day care monitoring.

The Role of the Parent

Parents visit their child's family day care home at least twice a day. Given proper information and a simple checklist to return to the licensing agency, parents can become a vital link in the enforcement process. As informed consumers, aware of existing standards, they can offer daily monitoring of the family day care home. Educational materials should be made available through local social service departments, governmental agencies, and Child Care Resource and Referral agencies and should be distributed to each parent by the providers.

The Role of the Provider

Providers need incentives to enter the regulatory system. Licensed providers should have access to a variety of support services and tangible incentives that will benefit them directly, improve their professional image and generally enhance the quality of care. The development of family day care networks in local communities is one way to offer supports to attract providers to the regulatory system. Family day care providers are not simply "babysitters;" they need training and support to do their jobs well.

Because providers have limited resources, and the cost of litigation is

high, providers who emerge from the unlicensed "underground" should have access to legal assistance if they are challenged by municipal regulation.

The Role of the Child Care Resource and Referral Agencies

The Child Care Resource and Referral agencies (CCRRs) have a vital role to play in enhancing both the availability and quality of family day care in New York State. They are in an excellent position to recruit new family day care applicants, to coordinate the provision of group benefits, and the allocation of child care subsidies. They can make post certification visits, while offering providers tangible services such as start up funds, assistance in record keeping, and lending toy and book libraries. They also offer the kind of training, technical assistance and program enrichment that is vital to the professionalization of family day care.

However, without a regulatory system that makes licensed family day care available, CCRRs will continue to meet with only limited success. The suggestion that CCRR agencies assume the licensing role in place of governmental agencies is not an adequate solution. To be effective, CCRR agencies need to remain independent of the regulatory function. It remains the government's role to enact and enforce standards, while the Child Care Resource and Referral (CCRR) is in an optimal position to offer technical assistance and direct support services to parents and providers to enhance the availability of quality family day care. If Child Care Resource and Referral agencies assume the role of policing family day care, they will undoubtedly face conflicts of interest with the supportive role they currently play. In the long run, their effectiveness as child care advocates may be compromised by the competing demands placed upon them. Additionally, they would also

subject themselves to the same liabilities that governmental licensing agencies have traditionally been exposed to without the accompanying resources, immunities, and protections.

The Role of Employers

Many employers who understand the importance of ready access to quality day care for the children of their employees are actively supporting the expansion of referral and resource agencies. By offering financial support to community child care services, corporations will continue to contribute to the quality and availability of family day care .

B. Recommendations For Improving the Present System

1. The Need for One Licensing Agency - There is no apparent reason for maintaining two separate licensing agencies for publicly subsidized and non-subsidized family day care. To coordinate family day care licensing and to simplify the licensing process, licensed homes should be equally accessible to all children. The goal of the system should be to bring the maximum number of homes into the regulatory system to accommodate the maximum number of children regardless of income eligibility. The artificial separation between subsidized and non-subsidized care has undermined the coordination of services to parents, providers, and children and the development of a comprehensive system for the delivery of family day care. Obtaining a license should be a simple procedure. The State Department of Social Services could establish a centralized family day care licensing division which would place licensing specialists in regional offices throughout the state. As an alternative, licensing could be delegated to local social service districts or another local governmental agency, e.g. The Department of Health. In either case, if home visits continue to be a prerequisite to certification, then

additional staff will have to be assigned to fill these positions at considerable cost.

The situation becomes even more convoluted in New York City where there are not only two separate agencies administering family day care, but two entirely different sets of standards and regulations.

2. Recommendations Regarding the Problem of Municipal Regulation of Family Day Care

Municipal regulation inhibits the expansion of family day care and will continue to undermine attempts to develop uniform and rational standards for the protection of children in these settings. Without clarification of the role of municipal agency regulation and clear definition of standards, uncontrolled local agency regulation will continue to impede the expansion of family day care.

To avoid unnecessary municipal regulation, the standards set forth in the social services regulations need to be sufficiently comprehensive and specific to provide for the protection of children in family day care homes. Subjective language such as "adequate," and "suitable" should be replaced with quantifiable and objective standards wherever possible.[108] Such terms as "readily accessible means of egress" should be defined.

Current regulations should be reviewed periodically with input from relevant

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108 For example, in Vermont, the provider is required to produce a statement from a service company that the boiler has been inspected within the last year and was found to be in good working order. Pool areas should be required to be fenced and locked. Standards could designate the type of fire extinguishers and smoke detectors required and their locations.

state agencies.109

If the state does its job well in establishing comprehensive standards, there is then no rationale for municipalities to be involved in standard setting. Any variations needed to accommodate local conditions (e.g. large multiple dwellings in New York City) would be accomplished simply by applying the same building, health, fire and safety standards that apply to similar residences under the local codes.

One legitimate role for municipalities might be to goad providers into becoming licensed. They might make complaints to the state agency if a licensed provider appears to be in violation of some state standard, or possibly be allowed to prosecute operators of unlicensed family day care homes.

Statutory language could be enacted to clarify that:

> "the use of a residence as a family day care home shall be considered a residential use of property for the purposes of all local ordinances," [and that] "no city, county or district shall adopt or enforce any local ordinance or local rule or regulation that is inconsistent with state standards except where such rules apply to all single family homes."110

This would end the application of inappropriate standards by local agencies to licensed family day care. The state regulation requiring that:

> "a statement from an appropriate official or authority that the dwelling meets standards for sanitation and safety where local fire, health and/or building code authorities require approval," 111

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109 The regulations governing family day care have not been updated since 1978. There is no requirement that family day care homes have smoke detectors or heat detectors or that electrical outlets be child proofed. These represent examples of some of the most obvious safety precautions that should be required in any licensed family day care home.

110 This is the language that has been adopted by the California Legislature to address the problem of multiple agency regulation. California Health and Safety Code {1597.45.

111 18 NYCRR 417.7(d).

should be repealed or at least clarified. Because of its ambiguity, this provision contributes to the confusion, lack of uniformity and the application of inconsistent and irrelevant standards so characteristic of family day care regulation in the state. Because family day care by definition takes place in the home, it is logical that any local health, safety or fire codes for residential dwellings would apply equally to family day care homes. State regulations requiring that

> "family day care homes comply with state and local departments of health and require adequate and safe water supply and sewage facilities which comply with state and local laws,"[112]

likewise needs repeal or clarification. In general, local agencies should be precluded from treating licensed family day care homes differently from other residential dwellings.

3. Making Group Family Day Care A Permanent Option

Group family day care provides another option for the expansion of family day care by allowing the provider to take in more children. Group family day care should be distinguished from both family day care and day care centers in statutes and regulations. While additional fire and safety precautions may be necessary because a significantly larger number of children are in the home, it must be clear that group family day care is not intended to be regulated as a day care center or a nursery school. To avoid the pitfalls of multiple agency regulation, standards must be tailored specifically to the group family day care situation and cannot be left to the whims of local agencies. Left to the mercy of local regulation, group family day care may

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[112] 18 NYCRR 417.7(a).

encounter insurmountable regulatory barriers. Alternatively, if standards are clearly defined and enforced by one regulatory agency, group family day care offers an option that should increase the availability of care.

Any new legislation should clarify that group family day care takes place in a home and is a residential use of property to be considered a single family dwelling for purposes of local regulation.113 Recognizing the need for uniformity as well as the fact that special fire and safety precautions may be necessary, minimum state fire and safety standards should be adopted. The legislation should designate the agency responsible for enforcement.

The issue of multiple agency regulation and local zoning also needs to be addressed directly in any legislation or regulations pertaining to group family day care if the zoning problems encountered by family day care providers are to be avoided.

4. Recommendations and Options for Resolving the Problem of Municipal Zoning and Family Day Care

a. Legislative Restatement of Overriding State Concern

The Legislature should adopt language that clearly overrides any attempt by municipalities to restrict the availability of family day care in residential neighborhoods. Such legislation has been adopted in at least five jurisdictions, including California, Delaware, Washington D.C., Idaho, and Minnesota. Failure

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113 If group family day care is treated as a day care center under the State Building Code it would not be permitted above the first floor except in buildings of type I fire resistive or type 2 noncombustible construction. If, on the other hand, it is treated as a single family dwelling as family day care is classified, it would not be classified on the basis of fire hazard at all. 9 NYCRR 702.

to adopt legislation will undoubtedly result in further litigation between family day care providers and municipalities.

It would be preferable to address the zoning question directly in legislation governing family day care, but even simple language adopted in a declaration of purpose implying an overriding state concern or the need to make family day care available in residential neighborhoods would bolster the case of the providers considerably in the event of litigation. In the meantime, harassment of local providers by municipalities not only will continue to force family day care underground, but will undermine efforts to expand the availability of family day care. Undoubtedly, family day care offers parents of young children a very important and necessary option in child care. This option should not be undermined by municipal officials. Nor should licensed providers be expected to stand alone to defend their right to care for children in their homes without stronger pronouncements from the State to support them.

b. Municipal Zoning And Group Family Day Care

If group family day care becomes a permanent option, its overall success will depend partially on whether the legislature addresses the zoning issue. Municipal zoning laws will present a much more formidable obstacle to group family day care than to family day care because of its increased visibility in residential communities. At a minimum, a clear statutory definition distinguishing family day care and group family day care is needed to assist local child care councils and providers who will be confronting zoning issues in their municipalities.

Ideally, all family day care should be exempt from municipal zoning

regulation. Minnesota has enacted legislation which provides that

> "a licensed residential facility serving six or fewer persons or a licensed day care facility serving 12 or fewer persons shall be considered a permitted single family residential use of property for purposes of zoning." 114

If compromise is necessary, limited options for municipal zoning regulation of group family day care should be considered, as California has done. The California experience gives insight into options which allow for some municipal regulation of group family day care without subjecting each provider to the possibility of lengthy litigation. California strictly prohibits municipalities from excluding group family day care from single family zones by providing three zoning options:

1. Homes may be treated as a permitted use of residential property for zoning purposes, requiring no special permit.

2. Municipalities may pass ordinances to require group family day care providers to apply for a non-discretionary permit to use their property for group family day care. Under this option, municipal government may establish reasonable standards governing space and concentration, traffic control, parking and noise levels.

3. Municipalities may require a conditional use permit as a prerequisite for using one's home for group family day care. 115

Notification to interested parties of their right to request public hearings can avoid the need for automatic hearings in all cases. Automatic public hearings as a prerequisite for local zoning approval would create another deterrent to prospective providers. It would also serve to over-politicize the issue of group family day care.

5. The Need to Enforce the Current Licensing Law

A public education campaign about the law requiring family day care

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114 Minnesota Public Welfare Law {245.811.

115 California Health and Safety Code { 1597.46.

providers to become licensed needs to be launched. To accomplish this objective, the following initiatives should be undertaken:

- A major parent education campaign to encourage parent monitoring of family day care homes.

- Licensing needs to be promoted as a means for providers to obtain services that will enhance their ability to provide quality family day care and their professional image.

-Creative mechanisms for enforcement need to be devised including standardized notices to underground providers which encourage them to become licensed within a certain period of time before sanctions are applied.

C. Regulatory Alternatives to The Current Licensing Provisions

In attempting to devise the proper regulatory fit, several alternatives deserve consideration. Regardless of which system is ultimately adopted, the recommendations made above should be incorporated into any model. There are many variations of the current regulatory scheme which may enhance the availability of regulated family day care. Some of these alternatives include:

1) Annual self certification with home inspections conducted every two years, with immediate responses to Complaints and requests for assistance.

2) Voluntary registration of family day care home providers for the care of less than four children, strict prohibition against caring for more than two children under the age of two and licensing of all family day care homes caring for four or more children. (The current law requires certification of any home caring for three or more children.)

3) Mandatory registration for all family day care homes caring for three to six children, with annual home inspections as a prerequisite to licensing

group family day care homes.

4) A provisional license granted prior to permanent certification upon the provider's sworn statement that she meets all requirements other than the home inspection. This would avoid any delay caused by waiting lists for certification due to inadequate licensing staff.

For some time, experts in the field have seriously questioned whether the traditional licensing model is even appropriate to family day care regulation.[116] Several other states have confronted similar problems to those highlighted in this report. Some have shifted from a traditional licensing system to a simplified mandatory registration system. Such a change has generally resulted in a significant increase in the number of licensed providers.[117] Thus, a model which deserves serious consideration is a mandatory registration - self certification model with built in parental monitoring.

> "Registration generally requires providers to register with a government agency and attest to the health and safety of the environment in the family day care setting. Fingerprint checks and TB clearances are also required. A complaint system is clearly established and all complaints are routinely investigated. The regulatory and support functions are separated under this form of regulation. There is no lengthy wait to discourage prospective providers from entering the

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[116] Morgan, Gwen, "Can Quality Day Care Be Achieved through Regulation," in Advances in Early Education and Day Care, Vol 1, 1980. See also Class, Norris, Regulation and principles of Child Care Regulation - Thoughts on Family Day Care Regulation in the unpublished edition of The National Conference on the Registration of Family Day Care Homes, San Antonio, Texas, 1977.

[117] According to the 1983-84 Family Day Care Licensing Study, conducted by the Family Day Care Advocacy Project of the Children's Foundation, 18 states have adopted a registration system for regulating family day care. See The National Conference on the Registration of Family Day Care Homes, San Antonio, Texas, 1977 for documentation of the effects of implementing a registration system. Michigan Department of Social Services, Demonstration Project for the Registration of Family Day Care Homes (Interim Report), Feb.12, 1976.

field, and home visits are made of a random sample of providers to check for compliance." 118

In suggesting a registration model, it is important to recognize that the positive aspects of the current system are not compromised. The same or higher standards can be applied, and periodic monitoring and inspections must be built into the system.119 Government inspections remain an integral part of the system. However,they are no longer a prerequisite to licensing. In place of the annual government inspection, the provider gives a sworn statement of compliance, educated parents act as monitors, playing a vital role in the enforcement process, and a simple complaint procedure is established. By bringing the provider into the regulatory system, the provider gains access to the support services of local child care agencies.

A system which supports and encourages compliance and enlists parents as educated and informed consumers may be the most appropriate form of regulation for family day care. By developing the parents' role as monitors and utilizing public resources to concentrate on enforcement, an effective and enforceable system can evolve. Through mandatory self certification, providers are encouraged to become visible, enabling private agencies to provide support services to both parents and providers.

By bringing more providers into the regulatory system, quality concerns can be addressed directly through parent and provider education, training, and consultation services; through the development of associations among providers; and through workshops, material and equipment sharing. With the availability

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118 Fuqua, Robert, Making Day Care Better, Teachers College Press, p. 12, 1984.

119 Researchers have estimated that random inspections of approximately one-third of all licensed homes annually provides adequate compliance.

decisions based on quality. As the system now exists, if the state adopted the goal of even 80% compliance with the licensing law, they would have to hire platoons of inspectors simply to accomplish the annual home inspections. By instituting a registration system, public agencies can devote their energies to following up on complaints while Child Care Resource and Referral agencies provide support services to increase the quantity and overall quality of family day care.

In conclusion, any form of family day care licensing, whether registration, certification or permits, can only be expected to maintain minimal health and safety standards for the protection of children. In any effort to ensure that all children receive licensed care, the state must strive to maintain the proper balance between under-regulation that fails to protect the children it seeks to protect, and overregulation which makes licensed care unobtainable and deprives children of licensed care altogether. Thus, effective regulation must actively recruit the underground providers into compliance. Similar to the existing licensing system, registration does not mean deregulation or compromise - it merely offers a simpler system and perhaps a more logical form of licensing that relies heavily on the establishment of a responsible partnership between the parent and state, rather than on one that is built on the myth that an annual governmental inspection is the equivalent of the "good housekeeping seal of approval."

Table 1

Distribution of Subsidized and Non-Subsidized Family Day Care Homes

New York State, 1985

	Total		Balance of State		New York City	
	#	%	#	%	#	%
Total	3,625	100.0	1,641	100.0	1,984	100.0
Subsidized	3,234	89.3	1,354	82.5	1,880	94.8
Non-Subsidized	391	10.7	287	17.5	104	5.2

Source: For balance of state data, recap of permits issued and certificates approved, New York State Department of Social Services, November 31, 1985; For New York City data, the City of New York Department of Health, Bureau of Day Care, November, 1985.

TABLE 2

Comparison of Total Number of Family Day Care Homes In Selected States (in 000's)

1985

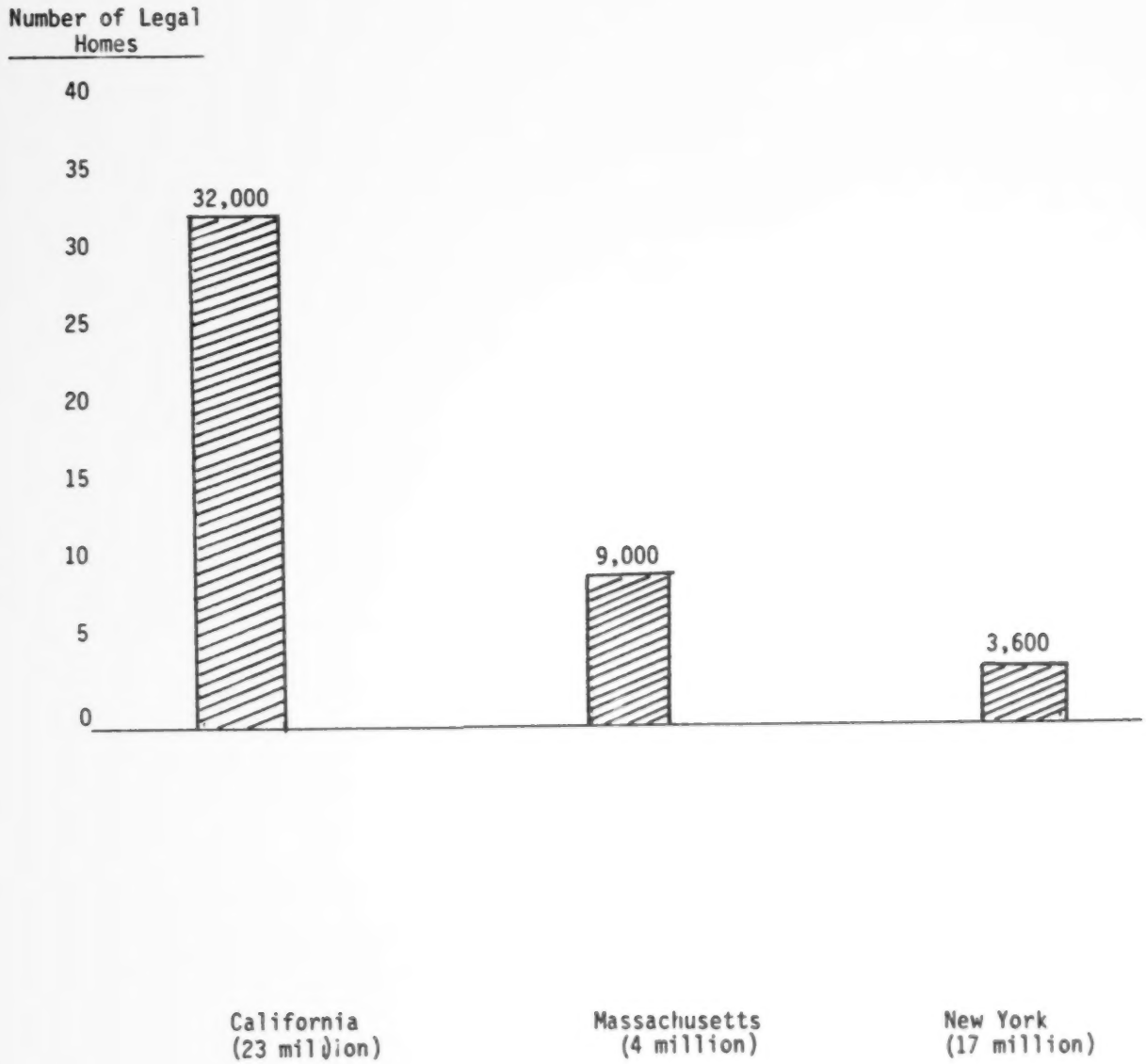

CHART 1

Family Day Care Certification System in New York State

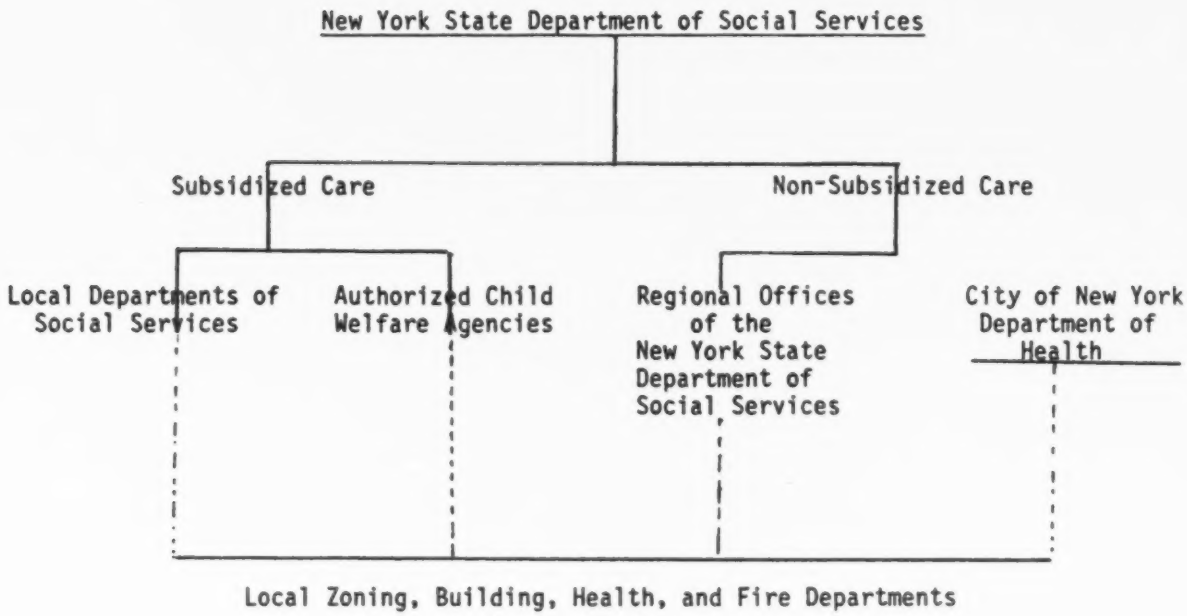
New York State Department of Social Services
Subsidized Care
Non-Subsidized Care
Local Departments of Social Services
Authorized Child Welfare Agencies
Regional Offices of the New York State Department of Social Services
City of New York Department of Health
Local Zoning, Building, Health, and Fire Departments

CHART 2

Standards for Certified Care

	New York State		New York City
	Subsidized (includes New York City)	Non-subsidized	Non-Subsidized
Maximum number of children in Care (None <2 years of Age)	6	6	5
Maximum number permitted without a license	2	2	5 (if none is under 2 years of age or over 14 years of age)
Maximum number of children without a license			
Maximum number of children <2 years of age	2	2	2
Health documentation of provider and household required	Yes	Yes	Yes
Home inspection required	Yes	Yes	No
Support services such as training and technical assistance required	Yes	Yes	No
Local zoning, building, health inspection if required	Yes	Yes	No